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No. 512

INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statutes involved	2
Statement	3
Specification of errors to be urged	5
Summary of argument	5
Argument	6
Conclusion	19
Appendix A (statutes)	20
Appendix B (dictionary definitions)	25
Appendix C (legislative history)	27–35

CITATIONS

Cases:

Anderson v. *Patten*, 247 Fed. 382	16
Ash Sheep Co. v. *United States*, 252 U. S. 159	17
Bird v. *United States*, 187 U. S. 118	18
Clark v. *Barnard*, 108 U. S. 436	18
Commonwealth v. *Herald Publishing Co.*, 32 Ky. L. Rep. 1293	8
Commonwealth v. *Magid*, 91 Pa. Superior Ct. 513	8
Donnelley v. *United States*, 276 U. S. 505	17
Duncan v. *United States*, 48 F. (2d) 128, certiorari denied, 283 U. S. 863	16
Dysart v. *United States*, 272 U. S. 655	15
Federal Trade Commission v. *Western Meat Co.*, 272 U. S. 554	17
Kinnaird v. *Commonwealth*, 134 Ky. 575	8
Mason v. *United States*, 260 U. S. 545	17
Mid-Northern Co. v. *Montana*, 268 U. S. 45	17
People v. *Brainard*, 183 N. Y. Supp. 452	8
People v. *Eastman*, 188 N. Y. 478	8
Regina v. *Wood*, 5 El. & Bl. 419	8
Richbourg Motor Co. v. *United States*, 281 U. S. 528	14
Rosen v. *United States*, 161 U. S. 29, 42–43	7
Swearingen v. *United States*, 161 U. S. 446	5, 8, 13, 16, 17
Tyomies Publishing Co. v. *United States*, 211 Fed. 385	15
United States v. *Alford*, 274 U. S. 264	17
United States v. *Davidson*, 244 Fed. 523	15
United States v. *Dempsey*, 188 Fed. 450	15

Cases—Continued. Page

United States v. Journal Co., 197 Fed. 415 16
United States v. Kennedy, 209 Fed. 119 16
United States v. Kissler, 220 Fed. 601 16
United States v. Mersell, 215 U. S. 26 18
United States v. Sprague, 282 Fed. 419 8
United States v. St. Paul M. & M. Ry. Co., 247 U. S. 310 14
United States v. Thind, 261 U. S. 204 7
Unity v. Burrage, 103 U. S. 447 18

Statutes:

Revised Statutes, sec. 5908 23
Act of June 18, 1898, c. 304, 29 Stat. 187 18
Act of September 26, 1888, c. 1039, 25 Stat. 496 18, 24
Criminal Appeals Act of March 2, 1907, c. 2564, 34 Stat. 1246 20
Criminal Code, Act of March 4, 1909, c. 321, 35 Stat. 1088, 1129, 1133—
Sec. 211 20
Sec. 212 22
Sec. 245 7
Food and Drugs Act of June 30, 1906, c. 3915, 34 Stat. 768 8
Act of March 4, 1911, c. 241, sec. 2, 36 Stat. 1327, 1339 22
Act of January 31, 1923, c. 14, 42 Stat. 54 20
Act of April 26, 1928, c. 440, 45 Stat. 466 20

Congressional Documents:

Congressional Record—
Vol. 42, pt. 1, pp. 539-542, 554 11
Vol. 42, pt. 1, pp. 995-999 13
Vol. 42, pt. 1, p. 995 12
Vol. 42, pt. 3, pp. 2891-2892 13
Vol. 43, pt. 1, pp. 253-254 27
Vol. 43, pt. 1, p. 254 29
Vol. 42, pt. 3, pp. 2635, 2642 7, 32
Vol. 42, pt. 4, pp. 3317-3318 32
House Rep. No. 2, pt. 1, p. 3, p. 22, 60th Cong., 1st sess., Cong. Doc. 5225 10, 11
Sen. Rep. No. 10, pt. 1, p. 22, pt. 2, p. 230, "Sec. 212," 60th Cong., 1st sess., Cong. Doc. 5230 11
Sen. Doc. No. 63, pt. 2, p. XVI, Cong. Docs. 4227 and 4228, 57th Cong., 1st sess., Sen. Docs., Vols. 9 and 10 10
Final Report, 1906, of U. S. Commission to Revise the Laws, Vol. 1, p. 107, under Sec. 5045, Vol. 2, p. 1313 11

Miscellaneous:

Abbott's Federal Crim. Law (4th ed.), pp. 260-261 15
Century Dictionary and Cyclopedia (1911), vol. 4 25
Standard Dictionary (1894), vol. 1 25
Webster's New International Dictionary (1919) 26
Letter from Postmaster General to Chairman, Committee on Revision of the Laws, December 28, 1906 33

In the Supreme Court of the United States

OCTOBER TERM, 1931

No. 513

THE UNITED STATES OF AMERICA, APPELLANT,

v.

O. B. LIMEHOUSE

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF SOUTH CAROLINA

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the District Court (R. 26–31) has not been reported.

JURISDICTION

The orders of the District Court sustaining a demurrer and a motion to quash the indictment were entered October 13, 1931. (R. 32–33.) A petition for a direct appeal to this Court was filed and allowed November 4, 1931. (R. 35.) The jurisdiction of this Court to entertain the appeal is conferred by the Act of March 2, 1907, c. 2564, 34 Stat. 1246 (U. S. C., Title 18, Sec. 682), commonly known as the Criminal Appeals Act, and by Sec-

tion 238 of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, 43 Stat. 936, 938 (p. 20, *infra*).

QUESTION PRESENTED

Whether it should be held, as a matter of law, that letters containing language which is coarse and vulgar, charging the addressees and persons associated with them with disgusting immorality, but which does not tend to corrupt the minds or morals of persons into whose hands they fall, are not "filthy" within the meaning of Section 211 of the Criminal Code, making it an offense to deposit in the mails matter which the section declares to be nonmailable.

STATUTES INVOLVED

Section 211 of the Criminal Code (U. S. C., Title 18, Sec. 334), so far as material, provides:

> Every obscene, lewd, or lascivious, and every filthy, book, pamphlet, picture, paper, letter, writing, print, or other publication of an indecent character * * * is hereby declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post-office or by any letter carrier. Whoever shall knowingly deposit, or cause to be deposited for mailing or delivery, anything declared by this section to be nonmailable, or shall knowingly take, or cause the same to be taken, from the mails for the purpose of circulating or disposing thereof, or of aiding in the circulation or disposition thereof, shall be fined not more than five thousand dollars, or imprisoned not more than five years, or both.

In Appendix A, pp. 20–24, *infra*, we copy this entire section and also other provisions of the statutes which may be considered in determining its construction.

STATEMENT

The appellee was indicted in the District Court for violations of Section 211 of the Criminal Code. The indictment contains thirty counts. (R. 1–24.) Each count charges that he

> unlawfully, knowingly, and wilfully did deposit and cause to be deposited, for mailing and delivery, certain nonmailable matter, to wit, a certain filthy letter and writing, in a certain post office of the United States * * * then and there well knowing the envelope to contain the said letter and writing as aforesaid, and well knowing the said letter to be filthy as aforesaid.

Each count sets forth *verbatim* a separate letter. There were twenty-seven different addressees, some being men and some being women. Apparently all of them were political opponents of the appellee, who were associated with an organization referred to as "D. R. L."[1] The motive for sending the letters appears in the assertions in the letters that the D. R. L. "stole the election," and that the addressees were sympathetic with the prosecution of one Grooms, whose cause the appellee espoused. The letters contain threats, some of which might be

[1] We understand that these letters stand for "Dorchester Reform League." Dorchester is a county in South Carolina.

construed as threats of violence, and accuse some of the addressees and others of being murderers and thieves.

The letters also contain torrents of foul language, charging the addressees and persons related to or associated with them with sexual immorality, sometimes in general terms, sometimes with specific persons, and sometimes promiscuously. They also contain, in the vernacular, reflections upon the parents and children of the addressees and others and allege that the addressees have been guilty of miscegenation and similar practices.

Nineteen of the letters are alleged to have been mailed at Charleston, South Carolina, on May 21, 1929, and eleven at Summerville, in Dorchester County, South Carolina, on June 20, 1929.

Appellee filed a demurrer to the indictment and a motion to quash it on the ground that none of the counts thereof charged an offense under Section 211 of the Criminal Code. (R. 25.)

The District Court entered orders sustaining the demurrer and granting the motion to quash. It certified that these orders were "based entirely upon a construction of the law and not on any defect in the indictment itself or any count thereof." (R. 32–33.)

The court characterized the language of the letters set forth in the indictment as "coarse," "vulgar," "indelicate," "disgusting," and said "some of it is plainly libellous, and some possibly indecent, but it does not tend to corrupt the morals of

the people in relation to sexual matters." (R. 26–27, 29.) It held that the word "filthy," as used in Section 211 of the Criminal Code, covered only matter which tended to induce sexual immorality.

SPECIFICATION OF ERRORS TO BE URGED

1. The District Court erred in sustaining the demurrer to the indictment.

2. The District Court erred in granting the motion to quash the indictment.

3. The District Court erred in construing the word "filthy," as used in Section 211 of the Criminal Code, as not including within its meaning the letters set forth in the indictment.

SUMMARY OF ARGUMENT

We submit that each count of the indictment charges the appellee with a crime. The only question is whether it should be held as a matter of law that the letters set forth in the indictment are not "filthy" within the meaning of Section 211 of the Criminal Code.

The word "filthy" seems to have no special meaning in law, and it should be construed in its ordinary sense, "nasty, disgustingly dirty, foul, impure, obscene."

Section 211 of the Criminal Code took the place of Section 3893 of the Revised Statutes. Section 3893 did not contain the word "filthy," but declared that every "obscene, lewd, or lascivious" writing should be nonmailable. In *Swearingen* v.

United States, 161 U. S. 446, this Court held that language similar to that here involved was not "obscene, lewd, or lascivious" within the meaning of Section 3893, as those words "have the same meaning as is given them at common law in prosecutions for obscene libel." Apparently the test which it laid down was whether the language was calculated to corrupt the minds and morals of those into whose hands the writing might fall.

After that decision Congress, apparently with the specific purpose of amending the statute so as to prohibit the very kind of thing which was held not to be within the scope of the statute in the *Swearingen* case, inserted the word "filthy." The word so inserted should not be construed so as to make the action of Congress vain or senseless.

ARGUMENT

The letters set forth in the indictment are not calculated to corrupt the minds or morals of those in whose hands they fall. But they abound in vile epithets and wholesale, as well as specific, charges of disgusting immorality. Each count of the indictment alleges that the letter therein set forth is "filthy." We submit that each count charges the appellee with a crime and that it is not subject to a demurrer or motion to quash. The only question is whether the District Court was right in holding that, as a matter of law, such letters could not be considered "filthy."

We submit that the court erred, and indeed that in a trial the court should instruct the jury that

each letter is filthy. See *Rosen* v. *United States*, 161 U. S. 29, 42–43.

The word "filthy" seems to have no special meaning in the law. Apparently it occurs in but few statutes, and we have found no helpful discussions as to its meaning in statutes other than the section here involved.[2] The word "filthy" is a word of common speech and should be given its ordinary meaning as understood by the common man. Cf. *United States* v. *Thind*, 261 U. S. 204, 209. The ordinary man would, we believe, regard the letters which the appellee sent as filthy. The dictionaries include among the usual meanings of the word "filthy"—"nasty, disgustingly dirty, foul, impure, obscene." (See Appendix B, pp. 25–26, *infra*.)

Perhaps an even more compelling reason for regarding the word as including the language in question is furnished by the legislative history of this section of the Criminal Code.

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[2] We have found but two other Federal statutes in which the word "filthy" is used. Section 245 of the Criminal Code (35 Stat. 1138, U. S. C., Title 18, Sec. 396) punishes the importation and interstate transportation of "any obscene, lewd, or lascivious, or any *filthy*, book, pamphlet," etc. This section amended earlier statutes by adding the words "or any filthy." The legislative history of this amendment is similar to that of Section 211 of the Criminal Code, the statute involved in the instant case, and shows that the words referred to were inserted in order that the language of the section should conform to that of Section 211. (Cong. Rec., Vol. 43, pt. 3, p. 2585.) No case construing the word "filthy" appears to have arisen under Section 245. The

Section 211 of the Criminal Code took the place of Section 3893 of the Revised Statutes (pp. 23–24, *infra*) which declared that "every obscene, lewd, or lascivious book, pamphlet, picture, paper, writing, or other publication of an indecent character" should be nonmailable, etc.* It did not contain the word "filthy." In *Swearingen* v. *United States*, 161 U. S. 446, decided March 9, 1896, this Court, with four justices dissenting, treated the phrase "obscene, lewd, or lascivious," as stating but one

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only other Federal statute using the word "filthy" which we have found is the Food & Drugs Act of June 30, 1906, c. 3915, 34 Stat. 768, 770. Section 7, paragraph 6, of that Act (U. S. C., Title 21, Sec. 8) provides that an article of food shall be deemed "adulterated" within the meaning of the Act if it consists of a "*filthy*, decomposed, or putrid animal or vegetable substance," etc. Here it is obvious the word "filthy" refers to a physical condition. See *United States* v. *Sprague*, 208 Fed. 419, 421 (E. D., N. Y.). An instance of the use of the word "filth" in reference to a physical condition is found in the English statute referred to in *Regina* v. *Wood*, 5 El. & Bl. 49, which gave the board of health power to make by-laws compelling the occupiers of premises to remove all "dust, ashes, rubbish, *filth*, manure, dung, and soil."

We know of but four States in which the statutes covering obscene writings contain the word "filthy"—Iowa, Pennsylvania, New York, and Kentucky. There are but few decisions construing these statutes. While those we have found construe the statutes narrowly, they do not specifically discuss the meaning of the word "filthy." See *People* v. *Eastman*, 188 N. Y. 478 (1907); *People* v. *Brainard*, 183 N. Y. Supp. 452 (1920); *Commonwealth* v. *Herald Publishing Co.*, 32 Ky. L. Rep. 1293 (1908); *Kinnaird* v. *Commonwealth*, 134 Ky. 575 (1909); *Commonwealth* v. *Magid*, 91 Pa. Superior Ct. 513 (1927).

*By an amendment approved September 26, 1888, c. 1039, 25 Stat. 496, "letters" were specifically included within the purview of the statute.

and the same offense, and said that these words signified "that form of immorality which has relation to sexual impurity, and have the same meaning as is given them at common law in prosecutions for obscene libel." It therefore held that the statute did not punish the mailing of a newspaper article, the language and tone of which were similar to those of the letters here involved. The Court said that the article did not contain "anything of a lewd, lascivious, and obscene tendency, calculated to corrupt and debauch the mind and morals of those into whose hands it might fall."

The law stood thus until March 4, 1909, when Congress, in enacting the Criminal Code (c. 321, 35 Stat. 1088, 1129), added to the words "obscene, lewd, or lascivious" the words "and every filthy," so that the statute thereafter read, "Every obscene, lewd, or lascivious, and every filthy, book," etc., shall be nonmailable, etc. (For the full text of Section 211, see pp. 20–22, *infra*.)

To solve the question presented here it is important to ascertain what Congress intended to accomplish by the amendment of 1909.

About a year after the *Swearingen* case was decided, a commission was appointed by the President, pursuant to an Act of Congress, to revise and codify the criminal and penal laws of the United States. This commission was directed to make a report of its conclusions to Congress, through the Attorney General. On May 15, 1901, it submitted a proposed Penal Code, together with a report in

which it said with reference to the statute under discussion:

> Section 185, "Obscene, etc., matter nonmailable:" In construing the act of September 26, 1888, amendatory of section 3893, Revised Statutes, the Supreme Court of the United States, in the case of *Swearingen* v. *United States* (161 U. S. 446), decided that "the words 'obscene,' 'lewd,' and 'lascivious,' as used in the statute, signified that form of immorality which has relation to sexual impurity, and have the same meaning as is given them at common law in prosecutions for obscene libel." In that case language of gross indecency was held not to be "calculated to corrupt and debauch the minds and morals of those into whose hands it might fall" so as to come within the terms of the law. In the light of this decision, and to prevent a flagrant abuse of the mails, we have added the words "indecent, vile, or filthy," in the revision of the sections mentioned. [Senate Doc. No. 68, Pt. 2, p. XVI, Cong. Docs. 4227, 4228, 57th Congress, 1st Sess., Senate Documents, Vols. 9, 10.][1]

The duties of the commission had meanwhile been extended to embrace the revision and codification of all the general and permanent laws of the United States. (House Report No. 2, Pt. 1,

[1] The statute, revised to read as suggested by the commission, appears at page 60 of the proposed penal code. This code immediately follows the commission's report in the congressional document.

p. 2, 60th Cong., 1st Sess., Cong. Doc. 5225.) On December 15, 1906, the commission rendered a final report to Congress, which, in so far as it related to the statutory provisions in question, was identical with its earlier report. (Final Report, 1906, U. S. Commission to Revise the Laws, Vol. 1, p. 107, under Sec. 8845; Vol. 2 (proposed bill), p. 1813.)

The commission then went out of existence. (House Report No. 2, Pt. 1, p. 2, 60th Cong. 1st Sess., Cong. Doc. 5225, *supra*.) A joint committee of the House and Senate was appointed to examine, consider, and submit to Congress recommendations with reference to the revision and codification prepared by the commission. This committee, during the first session of the Sixtieth Congress, submitted to each House a proposed penal code. This draft, in describing nonmailable matter, contained the phrase "obscene, lewd, or lascivious," without addition or change. The report which accompanied this draft made no recommendation of a change in that provision. (Senate Report No. 10, Pt. 1, p. 22, Pt. 2, p. 230, "Sec. 212," 60th Cong., 1st Sess., Cong. Doc. 5220; House Report No. 2, Pt. 1, p. 22, 60th Cong., 1st Sess., Cong. Doc. 5225.)

The proposed code was considered in each House sitting as in Committee of the Whole. (Cong. Rec., Vol. 42, Pt. 1, pp. 539–542; id. p. 564.)

When the section of the bill which later became Section 211 of the Criminal Code was reached for consideration in the House, Mr. Houston, who,

though a member of the joint committee, was not then acting on its behalf, moved to amend the section by striking out the word "or" before the word "lascivious" and by adding after that word the words "vile, filthy, or indecent." In offering this amendment, its sponsor said—

> the object of this amendment is to cure a defect that I think exists in the present law. Under the decision of the Supreme Court it has been held that these terms "obscene, lewd, or lascivious" refer only to sexual impurities or matters pertaining thereto. Now, there are a great many vile, filthy, and indecent articles not relating to that subject that are transmitted through the mails. We, the committee, have had these things before us, and we have had the information from the Department as to the character of many things not inhibited by existing law. Many of them are not covered by these words, but they ought to be prohibited and they will be by this amendment. [Cong. Rec., Vol. 42, pt. 1, p. 995.]

The Chairman of the House Committee on Revision of the Laws, Mr. Moon, who appears to have been spokesman for the joint committee in the House, refused to accept the amendment, his principal objection being directed against the use in the amendment of the word "indecent." He explained that while the committee did not object to enlarging the scope of the statute, it felt that the insertion of the word "indecent" in the statute might open up too broad a field for construc-

tion by the Post Office Department and the courts. Another member of the committee expressed similar views. Action on the amendment was temporarily deferred. (Cong. Rec., Vol. 42, pt. 1, pp. 995–999.)

An amendment similar in character, but which contained the word "disgusting" instead of the word "indecent," was offered in the Senate. After little debate, it was rejected. (Cong. Rec., Vol. 42, pt. 3, pp. 2391–2392.)

When the proposed amendment was later considered in the House, in place of the suggested words "vile, filthy, or indecent," the words "and every filthy" were inserted, and the bill as so amended ultimately became law. In the House, Mr. Houston and Mr. Moon both discussed the meaning of the word "filthy" at some length. (The relevant extracts from the debate, with other material bearing upon the understanding of Congress as to the meaning of that word, are printed in Appendix C, pp. 27–35, *infra*.) In the course of this debate Mr. Houston said that the word "filthy" referred to the character of the publication, and Mr. Moon stated that the general meaning of the word was "nasty, dirty, filthy, vile, and impure." Although the statements are not as explicit as might be desired, it would appear from the discussion that Congress intended to make nonmailable such language as that involved in the *Swearingen* case, at least. The language there involved was, as we have stated, similar to that here involved, although that here involved is even more offensive.

Under the circumstances, it would seem to be admissible to look to the statements of Mr. Moon and Mr. Houston to determine the meaning of the word "filthy." See *Richbourg Motor Co.* v. *United States*, 281 U. S. 528, 536; *United States* v. *St. Paul M. & M. Ry. Co.*, 247 U. S. 310, 318.

The amendment adding the words "and every filthy" was offered in the House sitting as in Committee of the Whole House, and was adopted by that committee. We are advised by the Parliamentarian of the House that the practice in such cases is for the chairman of the Committee of the Whole House to report orally approval of the bill as amended in the committee to the Speaker. No written committee report is made. The bill is thereupon placed upon the House Calendar to be voted upon without further debate. Under such circumstances it is obvious that the only source of information as to the legislative intent is the discussion which takes place when the measure is introduced and considered in the Committee of the Whole House. As the amendment involved in the instant case was accepted on behalf of the Committee on the Revision of the Laws by its chairman, the statements made by him, as well as by the sponsor of the amendment, would seem to be proper sources of information as to the congressional intent.

Apparently the only case under Section 211, except the instant case, in which the application of

the word "filthy" to language similar to that here involved has been passed upon is *United States* v. *Davidson,* 244 Fed. 523 (N. D. N. Y.), in which the court overruled a demurrer to the indictment and held that the question whether the language was "filthy" should be left to the jury. The word "filthy" in this statute has been given a broad construction in the only other cases in which its meaning has been expressly considered, *Tyomies Publishing Co.* v. *United States,* 211 Fed. 385 (C. C. A. 6th), and *United States* v. *Dempsey,* 188 Fed. 450 (E. D. Ark.). See also Atwell's Federal Criminal Law (Fourth Ed.), pp. 260–261.

In *Dysart* v. *United States,* 272 U. S. 655, (which the court below regarded as having "some persuasive force"), this Court held that letters advertising a home for the care and protection of pregnant unmarried women and their infants were not "obscene, lewd or lascivious," within Section 211, Criminal Code, even when mailed, without excuse, to refined women. It appears from the report of the case that the Solicitor General stated: "It is not * * * easy to believe that circulars of this kind could to any substantial degree undermine morals or induce delinquency." But the indictment there did not charge that the letters were "filthy," and the meaning and effect of that word were not considered either by the Solicitor General or by the Court.

Distinguishable on similar grounds is *United States* v. *Journal Co.*, 197 Fed. 415, 416, 418 (E. D. Va.). See also *United States* v. *Kennerley*, 209 Fed. 119, 120 (S. D. N. Y.); *United States* v. *Klauder*, 240 Fed. 501, 502 (N. D. N. Y.); *Anderson* v. *Patten*, 247 Fed. 382, 383 (S. D. N. Y.).

The court below relied to some extent upon the case of *Duncan* v. *United States*, 48 F. (2d) 128 (C. C. A. 9th), certiorari denied, 283 U. S. 863. In that case the Circuit Court of Appeals held that an indictment under the Radio Act of 1927 was bad in so far as it charged that certain language, somewhat similar to that used by the appellee in the instant case, which had been transmitted by a radio broadcasting station, was "obscene and indecent." The court said that the test to be applied was whether the language in question would arouse lewd or lascivious thought in the minds of those hearing it. It seems to us that this test is too narrow. The conviction was, however, upheld on the ground that the language was "profane" within the meaning of the Radio Act, and, of course, the question as to the meaning of the words "obscene and indecent" was not involved in the petition for certiorari. The word "filthy" does not occur in the Radio Act.

In the instant case the District Court held that the word "filthy" has no broader meaning than the word "obscene" and that as this Court in the *Swearingen* case ascribed to the word "obscene," as used in the original statute, the restricted mean-

ing of the words "lewd and lascivious," the word "filthy" should likewise be restricted. But we submit that this does not follow, inasmuch as the word "filthy" did not form a part of the original statute but was inserted therein by an amendment enacted after the decision in the *Swearingen* case. Two rules of construction appear to have influenced the majority of the Court in the decision of the *Swearingen* case—the doctrine of *noscitur a sociis* and the rule that penal statutes are to be strictly construed.

These rules are not applicable in the instant case. As this Court said in *Donnelley* v. *United States*, 276 U. S. 505, 512:

> The rule that penal statutes are to be strictly construed in favor of persons accused is not violated by allowing the language to have its full meaning where that construction is in harmony with the context and supports the policy and purposes of the enactment.

And rules like the doctrine of *noscitur a sociis* are but aids to construction and should not be allowed to defeat the purpose of a statute. See *United States* v. *Alford*, 274 U. S. 264, 267; *Mid-Northern Co.* v. *Montana*, 268 U. S. 45, 49; *Mason* v. *United States*, 260 U. S. 545, 554; *Ash Sheep Co.* v. *United States*, 252 U. S. 159, 170. When Congress, through amendatory legislation, attempts to change a prior legislative policy, its will should be carried into effect if the language used may fairly be construed as expressing the Congressional intent. See *Fed.*

Trade Commission v. *Western Meat Co.*, 272 U. S. 554, 559; *Bird* v. *United States*, 187 U. S. 118, 124; *Unity* v. *Burrage*, 103 U. S. 447, 457. An amendment to a statute should not be treated as vain or senseless if it is possible to avoid such a result. See *Clark* v. *Barnard*, 108 U. S. 436, 460–461; *United States* v. *Mescall*, 215 U. S. 26, 32.

The court below alluded to the fact that the language of Section 211 is narrower or, at least, less specific than that of Section 212 (p. 22, *infra*), which declares certain matter upon an envelope or a wrapper or a postal card nonmailable. The adjectives defining such nonmailable matter, such as "scurrilous, defamatory, or threatening" would, of course, include the language used by the appellee beyond peradventure of a doubt. But it may be admitted that these terms are broader and more specific than "filthy" without conceding that the word "filthy" does not describe the language of the appellee's letters. Language may be "filthy" without being "scurrilous, defamatory, or threatening," and it may be "scurrilous, defamatory, or threatening" without being "filthy." Section 212 originated in the Act of June 18, 1888, c. 394, 25 Stat. 187, which was amended by the Act of September 26, 1888, c. 1039, 25 Stat. 496.

CONCLUSION

We submit that the orders sustaining the demurrer and granting the motion to quash the indictment should be reversed.

Respectfully submitted.

THOMAS D. THACHER,
Solicitor General.

NUGENT DODDS,
Assistant Attorney General.

CLAUDE R. BRANCH,
Special Assistant to the Attorney General.

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FEBRUARY, 1932.

APPENDIX A

STATUTES

Act of March 2, 1907, c. 2564, 34 Stat. 1246 (continued in effect by the Act of February 13, 1925, c. 229, 43 Stat. 936, 938):

> CHAP. 2564. An Act Providing for writs of error in certain instances in criminal cases.
>
> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That a writ of error may be taken by and on behalf of the United States from the district or circuit courts direct to the Supreme Court of the United States in all criminal cases, in the following instances, to wit:
>
> From a decision or judgment quashing, setting aside, or sustaining a demurrer to, any indictment, or any count thereof, where such decision or judgment is based upon the invalidity, or construction of the statute upon which the indictment is founded.
>
> * * * * *

The statutes abolishing writs of error and providing for the procedure in appeals substituted for them are the Act of January 31, 1928, c. 14, 45 Stat. 54, and the Act of April 26, 1928, c. 440, 45 Stat. 466.

The Act of March 4, 1909 c. 321 (Criminal Code), 35 Stat. 1088, 1129:

> SEC. 211. Every obscene, lewd, or lascivious, and every filthy, book, pamphlet, pic-

ture, paper, letter, writing, print, or other publication of an indecent character, and every article or thing designed, adapted, or intended for preventing conception or producing abortion, or for any indecent or immoral use; and every article, instrument, substance, drug, medicine, or thing which is advertised or described in a manner calculated to lead another to use or apply it for preventing conception or producing abortion, or for any indecent or immoral purpose; and every written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information directly or indirectly, where, or how, or from whom, or by what means any of the hereinbeforementioned matters, articles, or things may be obtained or made, or where or by whom any act or operation of any kind for the procuring or producing of abortion will be done or performed, or how or by what means conception may be prevented or abortion produced, whether sealed or unsealed; and every letter, packet, or package, or other mail matter containing any filthy, vile, or indecent thing, device, or substance; and every paper, writing, advertisement, or representation that any article, instrument, substance, drug, medicine, or thing may, or can be, used or applied for preventing conception or producing abortion, or for any indecent or immoral purpose; and every description calculated to induce or incite a person to so use or apply any such article, instrument, substance, drug, medicine, or thing, is hereby declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post-office or by any

letter carrier. Whoever shall knowingly deposit, or cause to be deposited for mailing or delivery, anything declared by this section to be nonmailable, or shall knowingly take, or cause the same to be taken, from the mails for the purpose of circulating or disposing thereof, or of aiding in the circulation or disposition thereof, shall be fined not more than five thousand dollars, or imprisoned not more than five years, or both.

SEC. 212. All matter otherwise mailable by law, upon the envelope or outside cover or wrapper of which, or any postal card upon which, any delineations, epithets, terms, or language of an indecent, lewd, lascivious, obscene, libelous, scurrilous, defamatory, or threatening character, or calculated by the terms or manner or style of display and obviously intended to reflect injuriously upon the character or conduct of another, may be written or printed or otherwise impressed or apparent, are hereby declared nonmailable matter, and shall not be conveyed in the mails nor delivered from any post-office nor by any letter carrier, and shall be withdrawn from the mails under such regulations as the Postmaster-General shall prescribe. Whoever shall knowingly deposit or cause to be deposited, for mailing or delivery, anything declared by this section to be nonmailable matter, or shall knowingly take the same or cause the same to be taken from the mails for the purpose of circulating or disposing of or aiding in the circulation or disposition of the same, shall be fined not more than five thousand dollars, or imprisoned not more than five years, or both.

The Act of March 4, 1911, c. 241, Sec. 2, 36 Stat. 1327, 1339, amended Section 211 of the Criminal Code by adding thereto the following sentence:

> The term "indecent" within the intendment of this section shall include matter of a character tending to incite arson, murder, or assassination.

Section 3893, Revised Statutes (2d ed.):

> Every obscene, lewd, or lascivious book, pamphlet, picture, paper, writing, print, or other publication of an indecent character, and every article or thing designed or intended for the prevention of conception or procuring of abortion, and every article or thing intended or adapted for any indecent or immoral use, and every written or printed card, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, or how, or of whom, or by what means, any of the hereinbefore mentioned matters, articles or things may be obtained or made, and every letter upon the envelope of which, or postal card upon which, indecent, lewd, obscene, or lascivious delineations, epithets, terms, or language may be written or printed, are hereby declared to be non-mailable matter, and shall not be conveyed in the mails, nor delivered from any post-office nor by any letter carrier; and any person who shall knowingly deposit, or cause to be deposited, for mailing or delivery, anything declared by this section to be non-mailable matter, and any person who shall knowingly take the same, or cause the same to be taken, from the mails, for the purpose of circulating or disposing of, or of aiding in the cir-

culation or disposition of the same, shall be deemed guilty of a misdemeanor, and shall for each and every offence be fined not less than one hundred dollars nor more than five thousand dollars, or imprisoned at hard labor not less than one year nor more than ten years, or both, at the discretion of the court. And all offences committed under said original section thirty-eight hundred and ninety-three of the Revised Statutes prior to the approval of this act may be prosecuted and punished under the said original section in the same manner and with the same effect as if this act had not been passed.

The Act of September 26, 1888, c. 1039, 25 Stat. 496, amended Sec. 3893, R. S., by including "letters" within the purview of the section.

APPENDIX B

DICTIONARY DEFINITIONS OF WORDS "FILTHY" AND "FILTH".

Standard Dictionary of the English Language (1894), Vol. 1:

Filth, filth, n. 1. Anything that soils or makes foul; that which is foul or dirty; also, the state or quality of being foul; nastiness; dirt.

2. Anything that defiles or makes impure the spiritual nature; moral defilement; obscenity.

3. A low fellow.

Filthy. 1. Of the nature of or containing filth; dirty; nasty; hence, vitiated by contact with impurity; morally unclean or depraved; foul; obscene; as, a *filthy* street; *filthy* tastes.

The Century Dictionary and Cyclopedia (1911), Vol. 4:

Filth. *n.* 1. Anything that soils or defiles; foul, offensive matter; also, the state of being defiled; a foul condition; squalor; nastiness.

2. Anything that sullies or befouls the moral character; pollution; defilement.

Syn. 2. Impurity, grossness, obscenity.

Filthy. *a.* 1. Containing or involved in filth; foul; dirty; noisome; nasty.

3. Low; scurvy; contemptible; mean.

Syn. 1. *Dirty, Foul,* etc. (see *nasty*); squalid.—2. Impure, corrupt, gross.

Webster's New International Dictionary (1919):

Filth. n. 1. State or quality of being foul; foul treatment. *Obs.*

2. Foul matter; anything that soils or defiles disgustingly; repulsive dirt; nastiness.

3. Anything that sullies or defiles the moral character; moral defilement or transgression; corruption.

Filthy. a. 1. Defiled with filth, whether material or moral; nasty; disgustingly dirty; polluting; foul; impure; obscene.

Syn. Squalid, unclean, sluttish, gross, licentious. See dirty.

APPENDIX C

DISCUSSION IN CONGRESS WHEN AMENDMENT CONTAINING WORDS "AND EVERY FILTHY" WAS CONSIDERED AND LETTER OF POST OFFICE DEPARTMENT INDICATING CLASS OF MATTER IT DESIRED CONGRESS TO EXCLUDE FROM MAIL

When the amendment containing the words "vile, filthy, or indecent" was considered for a second time in the House (see p. 13, *supra*), the chairman of the House Committee on Revision of the Laws, Mr. Moon, made the following statement (Cong. Rec. Vol. 43, Pt. 1, pp. 283–284):

> The section of law under consideration is that under postal provisions repecting mailable matter; it has particular reference to that which is of an unmailable character and which is designated under existing law as "obscene, lewd, or lascivious." For a number of years after that law was passed there seemed to be no difficulty about its enforcement and about its general application. The courts had defined these words. They had defined the word "obscene" as meaning one kind of objectionable matter. They had defined it as applying to material that went through the mail that was of a coarse or vulgar or indecent character, and they had defined the other two words, "lewd or lascivious," as relating to matters having reference to sexual impurity. But in 1896 the Supreme Court, in a noted case, limited the

meaning of all of those words in existing law—"obscene, lewd, and lascivious"—limited them in their application to publications relating to sexual impurity.

The pending amendment seeks to create another class of publications that shall be excluded from the mail—a class which is vile and filthy, but having no relation whatever to sexual impurity. That is the character of the pending amendment. At the time of the suspension of our consideration I had objected to the word that had been offered as an amendment to designate this class—that is, the word "indecent." The pending amendment adds the words "vile, filthy, or indecent." I had objected, and it had been objected to by other members on the ground that the word "indecent" is of too broad a signification; that it might be construed not to mean simply immodest, and it might be differently construed by different people. It might be construed, and probably would be, as, and, indeed, that is one of its synonyms, simply as indelicate, and as chairman of the committee I opposed the amendment including that word because it would give to Postmasters-General and judges too great a power in using their individual sense and judgment of what would be indecent to exclude from the mail what has heretofore been mailable matter, and in the conviction of persons charged with a violation of this section.

Now, I have been informed by the gentleman from Tennessee [Mr. HOUSTON], who offers the amendment, that he is also of that conviction; that he has a proposition to make respecting an amendment of his amendment. Therefore I will leave the floor to the gentleman moving his amendment for his explanation.

Mr. Houston, the sponsor of the amendment accordingly withdrew it and substituted in its place an amendment which was adopted and which was couched in the present wording of the statute, "and every filthy." In offering this amendment its sponsor stated (Cong. Rec. Vol. 43, Pt. 1, p. 284):

> Mr. HOUSTON. Mr. Chairman, I will read the section as it will be if amended by the amendment offered by me and sent to the desk: "Every obscene, lewd, or lascivious, and every filthy book, and so forth." Now, if we use the words "and other filthy,"* I think we get in a more distinctive class, which will embrace other articles of publication which are objectionable and that ought to be barred from the mails. The classification as stated in the old section as stated by the chairman has been held by the courts to apply only to matters relating to sexual impurity. Now it was the object of the amendment to add in a different class of filthy matter and have them excluded from the mails, but it was thought that was perhaps too indefinite, and there has been some holding, especially in a New York case, which has construed the words "vile, filthy, and indecent" in connection with the same words in the federal statute here, as still enumerating the same character of offense, because of their connection in the section. Now when we make this addition, setting forth "ob-

* The use of the word "other" in place of "every" which occurs at several places in the discussion of the amendment was evidently inadvertent, or a stenographic or typographical error. The official record in the State Department of the engrossed bill, as signed by the Speaker of the House and by the President, and the Statutes at Large (35 Stat. 1129), show that the amendment as passed used the words "and every filthy."

scene, lewd, or lascivious," and then the phrase "and other filthy," that brings in a positive and definite class which I think will be of less doubtful construction.

Further light is thrown on the scope of the amendment in the statements made by the committee chairman and the sponsor of the amendment in the following colloquy which then ensued:

Mr. HUMPHREYS of Mississippi. I desire to ask the gentleman, Has there been any judicial interpretation of the word "filthy"? Does it have reference to anything other than the physical condition of the book? Have the courts given that word any other meaning?

Mr. MOON of Pennsylvania. Nasty, dirty, filthy, vile, and impure is the general meaning of it.

Mr. HUMPHREYS of Mississippi. But does not that refer to the physical condition?

Mr. HOUSTON. It does not. It would refer to the character of the publication.

Mr. MOON of Pennsylvania. No; it refers to literature. It could not give it that meaning.

Mr. STAFFORD. Does the gentleman think the word "filthy" adds anything to the strength of the amendment?

Mr. HOUSTON. No; but the word "filthy" makes it another class in addition to obscene, lewd, and lascivious.

Mr. STAFFORD. Would not the words "vile, indecent, and disgusting" be a rather broader terminology than "vile, filthy, and indecent?"

Mr. HOUSTON. It was the opinion of the committee, and I think correctly, too, that the words "and other filthy" added to the terms already in the statute would make a

distinct class that would reach the objectionable matter that has been complained of by the department as having been sent through the mails to quite an extent.

Mr. STAFFORD. I certainly favor the adoption of the amendment.

Mr. MOON of Pennsylvania. Mr. Chairman, one word on behalf of the committee. I have no doubt Congress originally intended to create two distinct classes of nonmailable matter by the existing section. Indeed, the decision of the circuit court prior to the time of the Swearingen case had defined the word "obscene," or "obscenity," as that form of indecency which is calculated to promote the general corruption of morals. They had defined lewdness and lasciviousness as that form of immorality which has respect to sexual impurity. However, that distinct classification was overturned by the Supreme Court decision in the Swearingen case, which decided that owing to the juxtaposition of the words "obscene," "lewd," and "lascivious" Congress had created but one class. Therefore feeling that Congress originally intended to create these two distinct classes of prohibition, on behalf of the committee I am entirely willing to put this language in the form offered by the gentleman from Tennessee [Mr. HOUSTON], which I think does create another class and a class that the department informs us it is very necessary should be excluded from the mails.

Mr. MACON. I would like to ask the gentleman a question before he takes his seat. Does the gentleman from Pennsylvania [Mr. MOON], chairman of the committee, think that "filthy" covers the word "vulgar?"

Mr. MOON of Pennsylvania. I do. The synonyms of "filthy" are "nasty," "dirty,"

"polluted," "foul," "impure," and "obscene."

Mr. MACON. Nothing vulgar?

Mr. MOON of Pennsylvania. Well, I do not know. "Vulgar" is also a very broad word. If it is vulgarity extended to the verge of impurity or nastiness of any kind, it certainly would be included, and if it is not, I am not sure the mails ought to be closed to it.

Mr. MACON. The federal courts are holding now that you can put a vulgar thing in a letter, use a vulgar word, and transmit it through the mails, and not be indictable under the present statute.

Mr. MOON of Pennsylvania. Under the construction given in the Swearingen case.

Mr. MACON. Now, I want to ask if "filthy" would take in "vulgar?"

Mr. MOON of Pennsylvania. In my judgment it would to the extent to which we are to legislate upon that subject. I think it would, in other words. We have given it careful consideration, and the committee was under the impression that the word "filthy" would cover just what the department asked us to exclude.

The bill as amended in Committee of the Whole was then passed by the House and went to conference. (Cong. Rec., Vol. 43, Pt. 3, p. 2649.) No change was made in the wording of the section in conference. (Cong. Rec., Vol. 43, Pt. 4, pp. 3217–3218.) After some debate the conference report was agreed to by both Houses and the bill signed by the President.

It will be noticed that in discussing the amendment the committee chairman and the sponsor of the amendment stated several times that the

amendment was designed to cover a class of matter which the Post Office Department desired to have excluded. In an effort to ascertain just what this type of matter was, the Postmaster General was requested to advise this Department of any recommendation which the Post Office Department had submitted to Congress with respect to the amendment of Section 3893 R. S., the predecessor of Section 211 of the Criminal Code. In response to the Department's letter the Postmaster General forwarded a copy of a letter dated December 28, 1906, from Postmaster General Cortelyou to Mr. Moon, Chairman of the House Committee on Revision of the Laws, which he stated appeared to be the basis of the recommendation made with respect to the inclusion of the word "filthy" in Section 211. This letter reads as follows:

DECEMBER 28, 1906.

MY DEAR SIR: Mr. Anthony Comstock, Post-Office Inspector, has directed my attention to seeming defects in section 218 of Bill H. R. 17984, entitled "A Bill to Revise, Codify, and Amend the Penal Laws of the United States," which, according to my understanding, is now under consideration by a joint committee of the two Houses of Congress. It is stated by Inspector Comstock that there is a great deal of vulgar and disgusting matter going through the mails the sending of which can not be punished under existing laws, or, apparently, under the Revision of the Penal Laws, as embodied in section 218 of the bill in question. That section, as it now stands, provides that "every obscene, lewd, or lascivious, book, pamphlet, picture, paper, letter, writing, print, or other publication of an indecent character," etc., is declared to be non-mailable mat-

ter, and shall not be conveyed in the mails or delivered from any post-office or by any letter carrier, and for the punishment of the offense of depositing such matter in the mails by a fine or imprisonment or both. The terms "obscene, lewd, or lascivious," according to the decision of the United States Supreme Court in *Swearingen* v. *United States* (161 U. S. 446), "signify that form of immorality which has relation to sexual impurity." It was said by the court to be undeniable that the newspaper article as found in the records, and with which the defendant was charged with having deposited in the mails, was "exceedingly coarse and vulgar, and, as applied to an individual person, plainly libelous. But we can not perceive in it anything of a lewd, lascivious and obscene tendency, calculated to corrupt and debauch the mind and morals of those into whose hands it might fall." The indictment in *Swearingen* v. *United States* was returned under section 3893 of the Revised Statutes, the language of which is precisely the same as that quoted in this letter from section 218 of Bill H. R. 17984.

It is suggested that the word "or" in line 19 of that section be omitted, and that following the word "lascivious" in that line the words "indecent or filthy" be inserted; that after the word "writing" in line 20 the word "or" be inserted; that in lieu of the words "or other" in the same line the words "and every" be introduced; and that the words "or filthy," following "indecent" in line 21, be inserted. The section will then read:

"Every obscene, lewd, lascivious, *indecent, or filthy* book, pamphlet, picture, paper, letter, writing, or print, *and every* publication of an indecent *or filthy* character," etc.

It is further suggested that the word "mail" be omitted from line 9 of section 218 as being superfluous and possibly confusing.

For the reasons given in respect of the changes suggested in section 218 it is recommended that the word "indecent" in line 23 of section 219 of the Revision be followed by the words "filthy, vulgar."

Very respectfully,

(Signed) GEO. B. CORTELYOU,
Postmaster General.

Hon. REUBEN O. MOON, M. C.,
Chairman Committee on Revision of the Laws,
House of Representatives.

U. S. GOVERNMENT PRINTING OFFICE: 1908